STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearings No. 13,995,) 13,996, 13,997, 13,999, Appeal of) 14,000, 14,001, 14,002,) 14,003, 14,004, 14,005, & 14,017

INTRODUCTION

The petitioners appeal decisions of the Department of Social Welfare denying their requests for hearing aids under the Medicaid program. These cases were consolidated at the request of the parties because they have a common set of issues.

FINDINGS OF FACT

The petitioners have filed individual stipulations of fact which are attached hereto and incorporated by reference herein. The common and salient facts are summarized below:

1. On May 5, 1995, the Human Services Board issued Fair Hearing No. 13,174 in which it ruled that Medicaid regulation M520 which covers rehabilitative therapy as an outpatient hospital service necessarily includes hearing loss therapy and its related equipment, including hearing aids. The decision was not based on the specific wording of the statute which did not contain the term hearing disorders but rather on the underlying state plan which stated that services for hearing disorders would be covered in the regulations.

2. The petitioners, who are all elderly persons who have documented hearing losses and prescriptions for hearing aids, applied for Medicaid for payment of those hearing aids between July 12, and September 18, of 1995. Although there was some delay in responding to some of the requests, they were all eventually denied. All of the petitioners have "written rehabilitation plans" which include the diagnosis of hearing loss and therapy prescribed therefore which consists solely of either the initial purchase or replacement of one or two hearing aids.

3. All of the petitioners except C.R. and B.G. are patients at a clinic which is owned by a hospital and used as an outpatient clinic by that hospital under the supervision of a physician and an audiologist. Petitioner C.R. is a patient at a private physician's office in a medical center which "meets the requirements of a hospital outpatient clinic". Only B.G. receives her therapy in a hospital.

4. In response to the Board's decision (and, undoubtedly, this flurry of applications), the Secretary of the Agency of Human Services applied on September 28, 1995, to amend the state plan by adding the same new provision under both the limitation of services for individuals with speech, hearing and language disorders section, HCFA plan, Item 11. a,b,c, and the limitation on prosthetic devices section, Item 12 c. The new limiting language in both sections provides as follows:

Hearing aids are not covered for recipients age 21 or older and are only covered for recipients under age 21 when they are determined to be medically necessary pursuant to § 1905 (r) of the Social Security Act.

The Secretary asked that the provisions be made retroactive to July 1, 1995. The amendment was approved by the HCFA Associate Regional Administrator of the Division of Medicaid on December 15, 1995.

ORDER

The decisions of the Department denying hearing aids to all petitioners is reversed.

REASONS

The petitioners argue their eligibility based on several provisions of the Medicaid regulations, but rely primarily on the outpatient hospital services provision interpreted by the Board in Fair Hearing No. 13,174 to include hearing aids as part of "rehabilitative therapies":

Outpatient Hospital Services

"Outpatient hospital services" are defined as those covered items and services indicated below when furnished in an institution meeting the hospital services provider criteria (M500), by or under the direction of a physician, to an eligible recipient who is not expected to occupy a bed overnight in the institution furnishing the service.

Covered items and services include:

. . .

Rehabilitative therapies (physical, occupational, speech, inhalation) related directly and specifically to an active written treatment plan established and periodically reviewed by the physician. The plan must be reasonable and necessary to the treatment of the individual's illness or injury; rehabilitative therapies will be routinely covered for the first four months on physician certification. A written request for prior authorization to extend the period of treatment by the physician must be submitted to the Medicaid Division with pertinent clinical data showing the need for continued treatment, projected goals and estimated length of time. Unless there is another episode of acute illness, of increased loss of function, authorization will not be granted for more than one year from the start of treatment.

. . .

M520

This provision requires that the service, in this case the hearing aid evaluation and rehabilitation component, be provided in "an institution meeting the hospital services provider criteria" at M500. M500 describes such an institution as either "a Vermont general hospital approved for participation in Medicare" (including several border state hospitals specifically listed as the equivalent of a Vermont hospital) or "an out-of-state general hospital" upon prior approval or in an emergency.

The facts in these cases are virtually indistinguishable from those in Fair Hearing No. 13,174 in which the Board concluded that a hearing aid was a covered service under the written rehabilitation plan for hearing disorders.

The Department argues that the petitioners who applied for coverage between July 17, 1995 and September 18, 1995, cannot be found eligible for a hearing aid because HCFA approved the state plan amendment removing therapy for hearing disorders from the listing of rehabilitative therapies provided for hospital outpatients retroactive to July 1, 1995. That argument might be persuasive if the petitioner had applied after the date of retroactive approval in December of 1995, for coverage for a service that was rendered to them after July 1, 1995. However, at the time the petitioners applied, the regulation which would have provided coverage for their request was in full effect and the future amendment was not to be filed until September 28th. The petitioner should have been found eligible for coverage of her hearing aid at that time and the Department's denial is reversible error.

Given the petitioners B.G.'s timely applications and findings of eligibility for the hearing aid, it is not necessary to determine whether the amendment is invalid due to a lack of rulemaking through the Administrative Procedures Act or lack of individual notice to Medicaid recipients of a termination of coverage, as the petitioners argue. It is difficult to refrain from noting, however, that the Department's decision to amend the rehabilitation therapy section is undoubtedly a change in coverage that generally and adversely affects all Medicaid recipients and as such is a "rule" subject to the procedures required by 3 V.S.A. §§ 836-843. See In Re Diel, 158 Vt. 549 (1992).

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